

## UNITED STATES DISTRICT COURT

## EASTERN DISTRICT OF NEW YORK

1 JAMES BENBOW, . Docket No.  
2 Plaintiff, . 1:17-cv-06457-EK-JRC  
3 v. .  
4 . Brooklyn, New York  
5 OFFICER BRIAN W. FEELY, ET . Monday, July 25, 2022  
6 AL., .  
7 Defendants. .  
8 . . . . . . . . . . .  
9

10 TRANSCRIPT OF MOTION HEARING  
11 BEFORE THE HONORABLE JAMES R. CHO  
12 UNITED STATES MAGISTRATE JUDGE

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## 1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everyone. We're here  
3 for a hearing on Defendant's motion for summary judgment in  
4 Benbow versus Feely, case number 17-cv-6457. Can the parties  
5 state their appearances for the record starting with  
6 Plaintiff?

7 MR. ABOUSHI: Good afternoon, Your Honor. Aymen  
8 Aboushi on behalf of the Plaintiff.

9 MR. KALMBACH: And Zachary Kalmbach from  
10 Corporation Counsel on behalf of Defendants.

11 THE COURT: All right. Good afternoon, everyone.  
12 And I do note for the record that parties -- or the Court did  
13 receive Docket Number 111, which was Plaintiff's submission,  
14 which was filed yesterday. All right. Mr. Kalmbach, this is  
15 your motion. Do you want to be heard?

16 MR. KALMBACH: Yes, Your Honor. Thank you. So as  
17 Your Honor is aware, Plaintiff filed this lawsuit alleging a  
18 number of claims, and I'll just address those claims in  
19 order.

20 First, Your Honor, Plaintiff alleges an excessive  
21 force claim against all of the Defendants. Centrally, his  
22 excessive force claim is against Officers Feely and Rosiello,  
23 who fired their -- or discharged their firearms in response  
24 to Plaintiff running with a firearm towards Detective Feely  
25 and refusing orders to drop his firearm. Now, really the

1 central issue is whether or not Plaintiff was holding a  
2 firearm. Plaintiff denies that he was possessing a firearm  
3 at the time, and the -- really, the motion turns on that  
4 fact, Your Honor.

5                 And even though Plaintiff now denies it, for  
6 purposes of defeating our summary judgment motion, he under  
7 oath during a plea allocution hearing admitted to, in fact,  
8 possessing the firearm. The fact that this Plaintiff's  
9 criminal case was thereafter dismissed or vacated has no  
10 bearing on whether or not Plaintiff was actually possessing  
11 that firearm. Here, the Court will take -- or should take  
12 judicial notice of the fact that Plaintiff -- or Plaintiff's  
13 testimony in the plea allocution hearing, he is now  
14 judicially estopped from arguing otherwise.

15                 And just to clarify, too, the Appellate Division's  
16 reversal of Plaintiff's criminal case had to do with whether  
17 there was reasonable suspicion to stop Plaintiff in the first  
18 place. It doesn't have anything to do with whether Plaintiff  
19 was actually possessing a firearm. So there's no genuine  
20 dispute that Plaintiff was holding a firearm. Now, Plaintiff  
21 now argues that he --

22                 THE COURT: Well, let me stop you for a minute  
23 there, Mr. Kalmbach. I want to be precise. So at the  
24 allocution, he admitted to possessing the handgun, right?  
25 What you just said was there's no dispute that he was holding

1 the handgun. I want to be precise, though. Do you have  
2 evidence other than the testimony that I assume from your  
3 officers that he was holding the gun, I don't think Plaintiff  
4 ever admitted he was holding it. Or am I misreading the  
5 record?

6 MR. KALMBACH: Well, to possess it, I believe he  
7 would have to be holding it. I guess I'm not understanding  
8 how --

9 THE COURT: Look, I think the argument you're  
10 raising is that he had this gun in his hand and pointed it at  
11 the officers, right?

12 MR. KALMBACH: Correct.

13 THE COURT: But if he had the gun in his back  
14 pocket, that's a different story; isn't it?

15 MR. KALMBACH: Well --

16 THE COURT: All right. You can possess it, but it  
17 can be in your back pocket. He's not pointing it at the  
18 officers at that time, right? I just want to be precise  
19 because -- unless you don't think we need to be that precise  
20 in dealing with this motion, right? If he just had it on his  
21 body, are you saying that's sufficient for defeating the  
22 excessive force claim?

23 MR. KALMBACH: I think it would be sufficient for  
24 at least on qualified immunity grounds to be running with a  
25 firearm and the officer telling him to drop the firearm,

1 essentially, and -- but it any event, I don't think Plaintiff  
2 in opposition argues whether or not -- so for -- Plaintiff  
3 doesn't say, okay, well, he was holding -- or he possessed  
4 the firearm but he wasn't holding it. That's not the  
5 position Plaintiff's taking in opposition to our motion. His  
6 position is that Plaintiff did not have a firearm at all,  
7 which is really -- and because if he did possess the firearm,  
8 now that's -- it's a different story because now we have our  
9 officers who already testified that they saw him holding the  
10 firearm.

11 THE COURT: Okay. So what you're saying though,  
12 then, is the fact that Plaintiff is denying that he ever had  
13 the firearm does not create a genuine issue of material fact.  
14 Is that what you're saying?

15 MR. KALMBACH: Correct, Your Honor.

16 THE COURT: Even though your officers disagree?

17 MR. KALMBACH: Yes. But we think that Plaintiff,  
18 his pre-allocution together with the fact that Plaintiff does  
19 not argue in opposition that there's any distinction between  
20 whether if he was possessing the firearm that it was in his  
21 back pocket or anything like that warrants -- or means that  
22 there's no genuine issue or fact that Plaintiff was holding  
23 the firearm. And even assuming for the purposes of argument  
24 that he possessed -- so say, in this hypothetical situation,  
25 which -- again, there's kind of two situations here, one,

1 Plaintiff did not have the firearm or two, Plaintiff had the  
2 firearm and was holding the firearm.

3 No party is arguing that there's anything in  
4 between. But just for the sake of argument, if Plaintiff was  
5 running at officers with a firearm, they would still be  
6 entitled to qualified immunity on that -- on those grounds,  
7 and also -- well, I'll leave it there on that point. And  
8 then I do want to make more qualified immunity arguments  
9 whenever the time's appropriate.

10 THE COURT: Understood.

11 MR. ABOUSHI: Your Honor, may (indiscernible), or  
12 are you going to do it by --

13 THE COURT: Yeah. Mr. Aboushi, I will turn -- I  
14 will give you plenty of opportunity to respond at the  
15 appropriate time, but why don't we hear from Mr. Kalmbach  
16 first.

17 MR. ABOUSHI: Thank you.

18 THE COURT: Mr. Kalmbach, since we're talking about  
19 the allocution, is it your view -- I assume this is the  
20 case -- that notwithstanding the Second Department's decision  
21 that the court -- this Court should still take into account  
22 his allocution. Is that your position?

23 MR. KALMBACH: Yes, Your Honor, based on the  
24 doctrine of judicial estoppel and the fact that the Appellate  
25 Division's reversal had nothing to do with whether Plaintiff,

1       in fact, possessed the firearm or did not possess the  
2       firearm.

3                 THE COURT: Understood. Does that also mean the  
4       Court should take into account that Plaintiff is arguing he  
5       was coerced and felt pressured to allocate the way he did --

6                 MR. KALMBACH: Well, in his --

7                 THE COURT: -- or --

8                 MR. KALMBACH: A, there's no evidence of that.  
9       Plaintiff says that -- in his 56.1 that his parents or  
10      family -- I can't remember who -- was pleading with him to  
11      take it, but there's no actual evidence of that that  
12      Plaintiff cites to, and B, in the allocution, he actually  
13      says under oath that he was not forced into taking this plea  
14      agreement. And it's just, like, as a matter of policy being  
15      able to say later in civil suits, oh, well, I was coerced,  
16      when there's no actual evidence of that beyond just the fact  
17      of taking a plea deal, which is a part of everyday criminal  
18      process isn't -- I guess as a matter of policy doesn't really  
19      make sense.

20                 But in any event, he said under oath that he was  
21      not forced into taking it. So our position is that the Court  
22      should disregard Plaintiff's now convenient claims that he  
23      was somehow coerced, which is a strong word considering what  
24      Plaintiff's actual claims are in this case.

25                 THE COURT: I understand that. But do you know,

1 then, why he appealed the judgment to the Second Department?

2 MR. KALMBACH: It was based on -- well, I guess I  
3 don't have his moving papers but reading the Second  
4 Department's opinion, which Plaintiff attaches to his motion,  
5 it's the thrust -- actually not what the -- the whole opinion  
6 is about whether -- and this is actually -- it looks -- seems  
7 to be a mistake, but the Second Department really discusses  
8 the standard for whether an anonymous tip can create  
9 reasonable suspicion and then the issue was -- so the Court  
10 found no in that case, and therefore, the firearm should've  
11 been suppressed. So it was based on suppression, not  
12 whether -- not actual possession.

13 THE COURT: I understand that. But if someone is  
14 pleading guilty, why would they appeal, then? Because  
15 they've already plead guilty.

16 MR. KALMBACH: I mean, maybe afterwards they talked  
17 to a lawyer, who gave them a second opinion on something or  
18 they talked to -- they went to the law library and found out  
19 about -- read about reasonable suspicion. There's a plethora  
20 of reasons why somebody would appeal and considering -- just  
21 to, like, take another kind of crack at the apple if you  
22 will -- but --

23 THE COURT: Okay. Or maybe he felt coerced into  
24 pleading guilty and decided to appeal. Is that a possibility  
25 as well?

1                   MR. KALMBACH: It's just such extreme conjecture at  
2 this point, Your Honor, when we have -- he testified under  
3 oath that he was not forced into pleading guilty.

4                   THE COURT: Understood. Okay. Go ahead.

5                   MR. KALMBACH: And so under the forced claims as  
6 well and also -- I'm not sure if Your Honor has viewed the  
7 security cam footage, but it does show Plaintiff also  
8 removing what appears to be a firearm from his waistband of  
9 his pants.

10                  THE COURT: Okay.

11                  MR. KALMBACH: So Plaintiff, then, argues that, oh,  
12 well, he was shot in the back, so he must have been running  
13 away from the officers, whereas, if you actually look at the  
14 photos of Plaintiff's injury, he was not actually shot  
15 directly in the back. The location of his injuries is  
16 consistent with the officer's testimony. But notwithstanding  
17 that, Your Honor, Plaintiff's argument also is that, okay, so  
18 I was running directly away from Officers Feely and Rosielo,  
19 and he submits this report by his purported experts that  
20 shows, like, an arrow purporting to be the direction that  
21 Plaintiff was running. That direction where he was running  
22 was directly where the other officers were standing; that's  
23 not disputed here.

24                  So under the objective qualified immunity standard,  
25 it was, in that situation -- actually, even setting aside

1 qualified immunity, in that situation, it would still have  
2 been objectively reasonable to fire at Plaintiff when he was  
3 running towards fellow officers with a firearm, even if it  
4 wasn't and the Court doesn't find that that was -- or does  
5 find that that was -- by itself would've been excessive  
6 force, here there's no clearly established law that in a  
7 situation where an individual is running towards police  
8 officers when in possession of a firearm, it is not  
9 objectively reasonable to use lethal force on that person.

10           In fact, just a couple weeks after this motion was  
11 fully briefed, the Supreme Court issued two more decisions  
12 strongly reiterating that when viewing -- or when analyzing  
13 qualified immunity, the analysis has to be very specific to  
14 the facts. Any that is to be -- for the law to be clearly  
15 established, the facts have to closely match up and the  
16 Supreme Court repeatedly again and again instructs courts to  
17 not define clearly established law at a level of generality  
18 but rather to analyze the -- or to match up these specific  
19 facts.

20           So at a minimum, our position is that the officers  
21 were entitled to qualified immunity on the excessive force  
22 claims. As to Plaintiff's excessive force claim against the  
23 other Defendant, our position is that those claims are  
24 abandoned. We argued that they were not personally involved;  
25 they did not use force; that's Defendants Anderson, Minucci,

1 Diab, and Mitchell, so Plaintiff's excessive force claim  
2 against those Defendants should be dismissed.

3           With regard to Plaintiff's false arrest claim, the  
4 collective knowledge doctrine applies here. The proper  
5 inquiry there is whether the arresting officer acted  
6 reasonably as opposed to whether probable cause actually  
7 existed or the vouching officer acted reasonably. Here,  
8 there was a tip from Officer Marshall (ph.) that Plaintiff  
9 possessed a firearm. At a minimum, even if that didn't rise  
10 to the level of probable cause and is setting aside the fact  
11 that Plaintiff has already under oath said that he did, in  
12 fact, possess a firearm, which that by itself is enough to  
13 defeat Plaintiff's false arrest claim.

14           But even setting that aside, the officers were  
15 entitled to rely on the tip from Marshall and at a minimum,  
16 that would provide the officers reasonable suspicion to stop  
17 Plaintiff, and upon finding the firearm, at that point, there  
18 was probable cause to arrest Plaintiff. That same analysis  
19 applies to Plaintiff's malicious prosecution claim. Probable  
20 cause also defeats such claims, and there's no evidence here  
21 that the probable cause officiated between the time the  
22 Plaintiff was arrested and arraigned.

23           Also, Plaintiff was indicted in this case. And  
24 indictment creates a presumption of probable cause, and  
25 Plaintiff has failed to overcome that, here. In addition,

1 Plaintiff has failed to satisfy the malice element of  
2 malicious prosecution claims. So for those reasons -- and  
3 again, this -- the central reason for why Defendant should be  
4 granted summary judgment for Plaintiff's malicious  
5 prosecution and false arrest claims is because he did, in  
6 fact, possess the firearm, which is -- satisfies the element  
7 of the crime by itself, so there was probable cause to arrest  
8 him.

9                 With regard to Plaintiff's failure to intervene  
10 claim, our position is that it was impossible for the other  
11 officers to intervene in the use of lethal force. Obviously,  
12 Officers Feely and Rosiello can't intervene in their own uses  
13 of force, so these claims are really against the other  
14 officers. And based on where Plaintiff admits that their  
15 positioning was, just based on the fact that there was only  
16 a few shots fired and we can't expect the officers to somehow  
17 jump in front of a bullet to stop this use of force,  
18 Plaintiff's failure to intervene claims clearly fail.

19 Lastly --

20                 THE COURT: Mr. Kalmbach, let me stop you for a  
21 minute. I have a question regarding the failure to  
22 intervene. Now, how long do you think the shooting took  
23 place? Clarify your view. Is it 20 to 30 seconds, or is it  
24 the 2 minutes? Is it the shorter or longer, or does it not  
25 matter?

1                   MR. KALMBACH: No. It was shorter. Our position  
2 is that it was just a matter of seconds. And Officer Feely,  
3 he said that there was -- in a testimony he mentioned the 20  
4 to 30 seconds, which I believe was between the first and last  
5 shot, if I'm remembering correctly. And even after that, he  
6 said -- he clarified that it was a boom, boom, boom, and that  
7 he had trouble estimating the times. Another officer who  
8 testified said that it was just two or three seconds. So our  
9 position is that it was shorter, but even if it was, it maxed  
10 20 to 30 seconds.

11                  But still based on where the other officers  
12 would've been standing, based upon the intensity of a  
13 situation which warrants lethal force and which lethal force  
14 was used, it is just not practical for the officers to have  
15 an opportunity, a realistic opportunity to actually stop the  
16 force. But our position is when actually looking at Officer  
17 Feely's testimony, it is a boom, boom, boom kind of situation  
18 here.

19                  THE COURT: Now, your friend on the other side says  
20 it could have been a longer episode, almost two minutes,  
21 right? You saw that argument, correct?

22                  MR. KALMBACH: Yes. That just -- even if --

23                  THE COURT: Now, let's assume that -- we're on  
24 summary judgment, so let's assume it -- the duration of the  
25 shooting was, in fact, two minutes. Would your failure to

1 intervene argument still stand? Assuming it were two  
2 minutes, do you think you still have a valid failure to  
3 intervene motion and you think -- and your position should be  
4 that should still be dismissed, even if it were the longer  
5 duration?

6 MR. KALMBACH: Yes. It would still be -- accepting  
7 that premise, which I think, again, looking at the actual  
8 evidence that that isn't possible. But accepting that  
9 premise is true, there was still a very -- there wasn't -- I  
10 think just practically for an officer to stop a gunshot is  
11 just not practical. Again, Your Honor, it's a premise that  
12 we just don't think is -- should be accepted in this case.

13 THE COURT: I understand that. But are you also  
14 saying, then, given the location of Anderson, Diab, Minucci,  
15 and Mitchell that even if it were two minutes, they weren't  
16 in a position to be able to intervene. Is that your argument  
17 or something else?

18 MR. KALMBACH: Yes, Your Honor. That would be  
19 correct.

20 THE COURT: Okay. Is it because your view is that  
21 they were not close enough to Feely and Rosiello to have done  
22 anything? Is that your position?

23 MR. KALMBACH: Is that and -- these kind of failure  
24 to intervene claims, Your Honor, they typically give rise in  
25 a situation where -- for example, if there's -- if there's

1 like a continuous beating of a arrestee who's in handcuffs,  
2 right? So there's a beating that allegedly goes on for say,  
3 like, two minutes, that's a much different situation  
4 where -- than here where the use of force is just a few gun  
5 shots.

6 THE COURT: Okay. I hate to do this, but I have a  
7 follow-up question on your excessive force claim. And maybe  
8 I've mired in the weeds, so maybe I shouldn't, but let's  
9 assume it's true what your -- what the Plaintiff is saying  
10 now that he did not have a gun with him. He did not possess  
11 a gun at that time. If that were the case, what happens to  
12 the excessive force claim? If he did not have a gun, does  
13 that mean any force used by your officers would have been  
14 accepted or not necessarily, if he did not have the gun?

15 MR. KALMBACH: It would --

16 (Simultaneous speech)

17 THE COURT: Again, assuming his testimony that he  
18 did not have a gun.

19 MR. KALMBACH: Yeah. If the Court accepts his  
20 testimony that he did not have a gun as true --

21 THE COURT: Yeah.

22 MR. KALMBACH: -- it's a more difficult case for us  
23 in that case, Your Honor.

24 THE COURT: I understand, okay, but I got to --

25 MR. KALMBACH: Yeah.

1                   THE COURT: Okay. Understood. Go ahead. Anything  
2 else?

3                   MR. KALMBACH: The last point is on Plaintiff's  
4 Monell claim. Many of his contentions on this claim as far  
5 as, like, how many lawsuits there were, how many complaints  
6 there were against the officers, things like that are just  
7 wrong. They're just, like, not factually correct, even  
8 looking at the evidence that Plaintiff cites. And it really  
9 just boils down to the fact that a Monell claim can't be  
10 premised on just a couple lawsuits and really can't be  
11 premised on lawsuits that don't result in liability, which  
12 here, there's no evidence that these officers were ever found  
13 to be liable in a lawsuit.

14                  And then, I guess I have -- I said one more but one  
15 more after that is just Plaintiff's claim for assault and  
16 battery and negligence also fail assault and battery for the  
17 same reasons as Plaintiff's excessive force claim and  
18 negligence because Plaintiff can't simultaneous assert  
19 negligence and intentional conduct.

20                  THE COURT: Okay. Mr. Aboushi, you've been very  
21 patient. I'll hear from you now.

22                  MR. ABOUSHI: Thank you, Your Honor. And if you  
23 get to know me, you'll realize how hard that was. Thank you  
24 for the opportunity, Your Honor. First and foremost, I want  
25 to incorporate by reference our opposition and submissions

1 therein to this oral argument and the points raised. Diving  
2 into the points raised by my colleague on the other side, I  
3 think the Court astutely noted the difference between possess  
4 and point, and I'd even take it one step further. There's  
5 nothing in the, I would say, deficient allocution that says  
6 he possessed it at that time or during his interactions with  
7 these officers. And so the record before the Court mandates  
8 that the Court deny the Defendant's summary judgment on this  
9 particular issue especially in addition to the others.

10       And you know, taking a step back, Your Honor, the  
11 Defendants only win this motion for summary judgment if you  
12 flip the standard for summary judgment on its head and take  
13 everything that they said is true and give them all  
14 reasonable inferences, which we all know that's not what the  
15 Court's supposed to do. So in nearly every argument made by  
16 defense counsel, he's saying the facts say this and the fact  
17 say that. And frankly, he didn't write the moving brief, but  
18 when I read the moving brief, the term undisputed was used so  
19 many times, I was flabbergasted because you can call this  
20 record many things, Your Honor. One thing that you cannot  
21 call it is undisputed, and only a jury can resolve these  
22 issues.

23       So even assuming that the allocution is  
24 valid -- and I'm going to get into that in a second -- or  
25 that the guilty plea is valid -- and I'm going to get into

1 that in a second -- there's still too far a bridge between  
2 allocating to possessing a gun and possessing a gun during an  
3 incident, an encounter with police. And even going a step  
4 further, which Your Honor would necessarily have to do to  
5 grant summary judgment, which is not only to say, okay, you  
6 possessed the gun during your encounter with the police, but  
7 you would also have to find, Your Honor, again, on summary  
8 judgment, that the Plaintiff pointed the gun at these  
9 officers.

10           And you know, that's just impossible given this  
11 record. Not only the witness -- the Plaintiff's testimony,  
12 but you have officer testimony at the scene that they never  
13 saw a gun, you have forensic information that reconstructs  
14 the shooting and flatly lays out to Your Honor that Plaintiff  
15 could have been in no position whatsoever other than running  
16 away from them in order to sustain the injuries that he  
17 sustained in his lower back, those bullet wounds. And my  
18 colleague on the other side, defense counsel, is a very  
19 capable lawyer, but one thing he's not is a doctor, nor is he  
20 a forensic reconstructionist, nor is a police practices  
21 expert. And you would need all of those things just to begin  
22 to surmount the issues of disputed fact, the genuine material  
23 issues of disputed fact and grant the Defendant's summary  
24 judgment.

25           Now, talking to the point regarding the guilty

1 plea, it's a bit frustrating to hear defense counsel talk  
2 about what his witnesses have said and actually embellish  
3 upon what his witnesses have said in some respect but then  
4 tell Your Honor there's nothing in the record to support  
5 coercion. There's a lot in the record to support a coerced,  
6 unfair, and erroneous plea of guilt. One you have the  
7 witness -- the Plaintiff's very testimony, two, you have his  
8 actions, which -- in which he appealed it. Two, you have  
9 the -- three, you have the transcript that shows the colloquy  
10 between him and the judge and his family was in the room and  
11 they're making noise. And by the way, Your Honor, all this  
12 is aptly laid out in the transcript in the testimony.

13           Additionally, Your Honor, you have the fact that  
14 the very -- Plaintiff testified on pages 56 of his transcript  
15 and 57 regarding the coercion that he was faced with, and he  
16 even talked about his attorney. It wasn't me, Your Honor,  
17 for Your Honor's edification. But on page 57, he's asked a  
18 follow-up question and I'll note without any objection from  
19 me. This goes on for pages where defense counsel's allowed  
20 to ask him these questions. And one of the final questions  
21 that he's asked is, so was it your testimony that you were  
22 coerced into pleading guilty to having a gun by the Judge?

23           Again, their own question, Your Honor, says to  
24 having a gun, not pointing a gun at the police, not having it  
25 during the encounter, not anything to do with the facts of

1 this case, and the answer is, yes, I was coerced. I was  
2 coerced by the lawyer. I filed ineffective assistance with  
3 counsel and all of that. Yes.

4 So Your Honor doesn't have someone standing before  
5 the Court for the first time saying that there was coercion  
6 or challenging on conviction. You have someone that said it  
7 at the hearing and on allocution, which Your Honor has plenty  
8 of experience giving these. I'm sure my colleague on the  
9 other side has read the transcript. I've done it. That was  
10 a very tortured allocution, if you want to call it that.  
11 I've never seen a gallery infect an allocution the way it did  
12 in this time where you have friends and family and someone's  
13 mother crying out from the galleries to tell them to take a  
14 plea. I've never seen the sort of promises that were made in  
15 this case. I've never seen someone faced with situation  
16 appeal it then also obtain relief by way of the Appellate  
17 Division.

18 So Your Honor doesn't just have someone in the  
19 abstract saying for the first time at the end of a lawsuit  
20 that they were coerced. Your Honor has his testimony, which  
21 in and of itself is sufficient, Your Honor. It creates a  
22 genuine issue of material fact. Then, you also have  
23 supporting evidence that buttresses his statement.

24 Then defense counsel referenced the video. If Your  
25 Honor hasn't watched the video, don't bother. It's at best

1 inconclusive, at worst shows the Plaintiff simply running.  
2 It's a grainy video that shows the Plaintiff begin to run.  
3 Now, obviously, the defense would want Your Honor to believe  
4 that that video shows him pulling out a gun out of his  
5 waistband, even though you can't see it on the video. But  
6 again, that would also flip the standard for Rule 56 on its  
7 head. You would have to, Your Honor, take all favorable  
8 inferences in favor of the Defendant and look into that video  
9 a gun.

10           But even if there was a gun, Your Honor -- and I  
11 want to get this out there because I think it's important as  
12 well -- Defendants, I think, have to argue that there was a  
13 gun at the scene in order to justify this unjustifiable  
14 shooting. But possession of a gun in and of itself is not  
15 authority to use excessive force, Your Honor. This is a  
16 highly, highly fact specific, only a jury can decide this  
17 issue that needs to proceed internally can't be decided on  
18 summary judgment. Even assuming arguendo that the Plaintiff  
19 possessed a gun in his pocket and he sees the police and he  
20 runs away, that doesn't permit them to shoot him,  
21 particularly in his back as he's running away.

22           Even if I would go so far as to argue, Your  
23 Honor -- and I'm not submitting that that's the case  
24 here -- Plaintiff was running with a gun in his hand away  
25 from the police. That's still not a license carte blanche

1 authority under our law to observe him running away, pull out  
2 a gun, and shoot him in his back. And mind you, Your Honor,  
3 while the defense picks and chooses what they want you to  
4 believe from their testimony, make no mistake about it, the  
5 Defendants can't agree on what happened. You have officers  
6 saying, oh, I shot --

7 THE COURT: Mr. Aboushi, let me interrupt you for a  
8 second. I want to ask you a question about something you  
9 just said. Again, we're just assuming for purposes of the  
10 motion, let's assume he did have a gun in his hand and was  
11 running away from the two officers, Feely and Rosiello. It  
12 seems to be Defendants' contention is perhaps they're running  
13 towards the other officers. Now, if that were the case,  
14 would your view be different that perhaps excessive force was  
15 not so excessive after all if, in fact, he had a gun in his  
16 hand and was running toward the other officers, the  
17 nonshooting officers?

18 MR. ABOUSHI: Thank you for that question, Your  
19 Honor. So I haven't heard the defense arguing, and it's  
20 nowhere in their papers that he had a gun in his hand and he  
21 was running towards these other officers. From what the  
22 evidence shows, Your Honor, there were officers on the  
23 sidewalk, there -- and there was an officer in the street,  
24 and when Plaintiff was running, he was running away from both  
25 where the officers in the street were and the officer on the

1 sidewalk was. He was running in the opposite direction. So  
2 we don't even have a situation here where there's a realistic  
3 threat that he has a gun in his hand -- again, which is not  
4 something the Plaintiff concedes or is even undisputed in  
5 this case, but let's --

6 THE COURT: Understood.

7 MR. ABOUSHI: -- just play some hypotheticals. He  
8 has a gun, he's running, and he's not running in the  
9 direction of any officer, Defendants would still be wrong.  
10 And here in this case, that's exactly what it shows. And I  
11 think the shooting reconstructionist is very, very valuable,  
12 Your Honor, in addition to the medical expert reports, which  
13 show the location of the injuries. You don't get those  
14 injuries unless you're shot in the back. And it lines up  
15 with exactly the way the Plaintiff testified to and Your  
16 Honor -- and the way the Defendants testified to.

17 If you look at the expert reports, these aren't  
18 one-sided expert reports that, you know, some hacks are paid  
19 to write. These are expert reports that take into account  
20 the mutual evidence at the scene, forensic evidence, for  
21 example, location of shell casings and other things, and they  
22 take into account what the Defendants said happened. So  
23 putting all that together, Your Honor, it shows that the use  
24 of force was improper, that they did not have probable cause  
25 to arrest him, and under no circumstances were they entitled

1 to shoot him in his back as he ran away from them.

2 Next, Your Honor, in terms of -- I think my  
3 colleague next talked about qualified immunity for a brief  
4 moment, the law is well established about the usage of  
5 excessive force and the use of deadly force. So that the  
6 Supreme Court recently came out with decisions a few months  
7 ago -- I don't know what they were because it wasn't  
8 referenced -- does not change the fact that, you know, use of  
9 excessive force is clearly established, shooting someone  
10 who's running away from the police and/or unarmed is also  
11 clearly established.

12 I don't see the Defendant's arguing that nor could  
13 they because there's been plenty examples in the city of New  
14 York where you have unarmed individuals or people running  
15 away from police have been shot in the back, and those -- I  
16 believe those lawsuits were able to proceed. And I can't  
17 think of the case off the top of my head, but I do remember  
18 reading at least one.

19 Now, in terms of Marshall, the disgraced security  
20 officer/auxiliary police officer that the Defendants  
21 referenced in trying to manufacture an argument for -- let me  
22 see what it was -- selective knowledge. So first, Your  
23 Honor, that doctrine's inapplicable. But even if the  
24 Defendants are able to convince Your Honor to say, okay, you  
25 should at least undergo this analysis, that analysis fails

1 because they failed to show that anyone other than Diab spoke  
2 to Marshall.

3                 Under the collective knowledge doctrine, the  
4 officers have to speak and communicate with each other. That  
5 didn't happen here. The only person in the record that may  
6 have spoken with Marshall was Diab. And guess what, Diab  
7 wasn't one of the people that shot the Plaintiff. So in  
8 terms of probable cause and the collective knowledge  
9 doctrine, I think that fails.

10                Next, Your Honor, is the failure to intervene.  
11 Again, you would have to accept the Defendants' version of  
12 events completely however absurd they are -- and I'll get to  
13 that in a minute -- as true in order to grant summary  
14 judgment on this claim. The reason why I say however absurd  
15 is because now defense counsel -- and again, I know he's  
16 doing the best he can, but defense counsel is now telling  
17 Your Honor what he thinks his deponent said because his own  
18 witness testified in a manner that precludes summary judgment  
19 on this claim to intervene. Their witnesses testified about  
20 30 seconds about 2 minutes. This isn't the Plaintiff. This  
21 is their witnesses that are testifying to it.

22                So Your Honor can -- is not in a position to rule,  
23 and I respectfully submit it would be improper to grant  
24 summary judgment on this without the fact finder having heard  
25 the testimony, observed the witnesses, looked at the

1 evidence, and decided whether or not -- how long the shooting  
2 occurred. And again, they would have to think that their own  
3 officers were wrong in what they testified to. It almost  
4 reminds of our -- the argument we made about the bullet that  
5 makes a U-turn because that's the only way that what they're  
6 saying is true and Plaintiff can be shot in the back.

7 Well, this is the same sort of thing with the  
8 testimony regarding intervention. You would have to reverse  
9 engineer the Defendants' own testimony to truncate the amount  
10 of time the shooting took place in order to grant summary  
11 judgment on the failure to intervene.

12 Additionally, Your Honor brought up some questions  
13 regarding how to intervene and then opportunities to  
14 intervene. Clearly, these officers were within distance of  
15 each other. They saw each other. I believe Anderson was  
16 standing on the sidewalk with another officer. All of these  
17 officers could've intervened in a bunch of ways. And I went  
18 over this in their depositions, Your Honor. This isn't news  
19 to anyone. They could have verbally instructed each other  
20 not to shoot just like some of the other officers on the  
21 scene did not discharge their weapon, right? Allegedly you  
22 have this guy running down the street, pointing a weapon at  
23 police officer, and only two officers out of, I believe, six  
24 or seven on the team fire, right?

25 So whether or not they had an opportunity to

1 intervene, what they could've done to intervene, including  
2 giving verbal commands, including the officer who's standing  
3 next to -- one of the shooters could've put his hand on his  
4 shoulder or said something to him or something else. All  
5 these are within the province of a jury, Your Honor, and it  
6 is not ripe for summary judgment.

7 THE COURT: Mr. Aboushi, question -- and some of  
8 this is a question I asked your friend on the other  
9 side -- does timing matter whether it was 20 seconds boom,  
10 boom, boom or 2 minutes in terms of the duration of the  
11 shooting? Does it make a difference on their motion for  
12 failure to intervene? In other words, if it were only a  
13 matter of seconds, would that have precluded these other  
14 officers from intervening? Whereas if it were two minutes,  
15 they probably had a better chance to intervene. Is that  
16 something the Court needs to focus on, the timing, or does it  
17 not matter?

18 MR. ABOUSHI: Well, I think on this disputed  
19 record, Your Honor, you're required to deny summary judgment  
20 on this because the jury needs to determine the time. I do  
21 think that time matters, Your Honor. If it was a split  
22 second, then I think under the law, the officer wouldn't have  
23 an opportunity to intervene, right? And I think that's  
24 fairly straightforward, and I'm willing to concede that part  
25 of the hypothetical.

1           But we don't have that here, Your Honor. We need  
2 the jury to sit down and say, okay, was this a two -- did  
3 this occur over 2 minutes; did this occur over 30 seconds,  
4 which frankly is still enough time to intervene. And if it  
5 did occur 30 seconds or 2 minutes as they say, was there a  
6 meaningful opportunity to intervene with the officers  
7 standing around their fellow officers who were shooting at an  
8 individual who was running away with them and we submit was  
9 unarmed?

10           So you know, your question and your point is well  
11 taken, Your Honor. I think if it was a split-second  
12 decision, a split-second event, I think that does not  
13 implicate failure to intervene. I don't even think we get  
14 that far down the hypothetical, Your Honor, because of the  
15 disputed facts that require a jury to really determine what  
16 happened, who was where, what opportunity did they have, who  
17 was in who's line of sight. These are the sorts of the  
18 things that I think the jury will focus on in the failure to  
19 intervene.

20           THE COURT: Okay. Understood. All right. Go  
21 ahead.

22           MR. ABOUSHI: Thank you, Your Honor. Next, you  
23 know, I wrote down the word typical when my colleague on the  
24 other side was speaking because I don't think any failure to  
25 intervene case is typical. IT may be typical in his

1 experience, but failure to intervene cases run the gamut from  
2 police shootings to police beatings to police chases, all of  
3 those situations. So I would not -- I would vehemently  
4 disagree with the characterization that in a police shooting,  
5 there's never an opportunity to intervene, and certainly no  
6 claim for failure to intervene can lie in a police shooting  
7 case. That's just not true, Your Honor.

8 And then, I believe the next point that was raised,  
9 Your Honor, is the Monell argument. I think defense counsel  
10 does a good job of seeking to minimize the record as to the  
11 Monell claims, but the facts are the facts, Your Honor. And  
12 this Court has been very clear in terms of what it takes to  
13 attach Monell liability, and frankly, there's more than  
14 necessary here to attach Monell liability.

15 We have, first and foremost, officers who are  
16 involved in lawsuits that, one, either don't know about them  
17 or -- more devastatingly for the Defendant -- they're not  
18 memorialized. How can you supervise and monitor your  
19 officers when you don't know when they're being sued and no  
20 one's keeping track? We also understand that possibly both  
21 but at least one of the shooters should have been in a  
22 program to monitor their performance strictly on metrics  
23 basis. That didn't happen.

24 You also had the number of complaints against these  
25 officers that are in and of themselves, Your Honor, to

1 inspire Monell liability and at the very minimum put it  
2 before a jury and have a jury decide that when these officers  
3 qualify for an early intervention program, have a certain  
4 amount of complaints lodged against them, have a -- are  
5 involved in a certain amount of lawsuits, should these  
6 officers have been on the street that night? Should these  
7 officers have received additional training? Should these  
8 officers have received additional supervision?

9                 The bar for Monell is not as high as my colleague  
10 on the other side would suggest. And I'm looking for the  
11 case now -- I believe you cited it -- but it seems recently  
12 out of the Eastern District -- and I believe it was Judge  
13 Dearie that wrote it -- upholding and denying summary  
14 judgment for a Monell claim and sending it to the jury -- the  
15 case settled, but where an officer had less complaints than  
16 the officers we have here, there were less lawsuits than the  
17 officers that we have here, and none of the officers in that  
18 case were subject to increased monitoring, which the officers  
19 in this case should have been subject to.

20                 Then finally maybe defense counsel ran out of  
21 steam. I don't blame him. This is all the argument. But I  
22 heard some things but not much about assault and battery and  
23 state law claims. Clearly, Your Honor, the use of excessive  
24 force dovetails from an assault and battery. The Plaintiff  
25 testified as to the elements of those claims. Obviously,

1 there was contact made with the Plaintiff. The Defendants  
2 shot him. He was conscious of that. He did not consent to  
3 it. He was put in imminent fear by the officers pulling out  
4 their guns, pointing at them and then shooting him. And so I  
5 believe that addresses the arguments raised by the  
6 Defendants.

7                   And Your Honor, in closing, I just would like to  
8 say that the parties could not be further apart on what  
9 happened in this case, and I think that's why summary  
10 judgment gets denied and it moves to a trial. You have the  
11 Plaintiff's testimony. You have the Defendant's testimony  
12 that supports what the Plaintiff says and goes against what  
13 some of the other officers are saying. You have forensic  
14 testimony, Your Honor, that analyzes the forensics at the  
15 scene, analyzes the testimony. And according to the science,  
16 according to cold science establishes what the Plaintiff has  
17 been saying: I was shot in the back as I was running away.

18                   And so in light of the foregoing, Your Honor, we  
19 respectfully request that Your Honor report and recommend  
20 that the motion for summary judgment should be denied. And I  
21 really thank Your Honor for taking the time to have us today  
22 and to also ask the important and thoughtful questions that  
23 you have posed.

24                   THE COURT: Mr. Aboushi, I do have another question  
25 for you. Do you agree that your claims of excessive force

1 against the nonshooters, Anderson, Diab, Minucci,  
2 Mitchel -- are you not pursuing those; is that correct?

3 MR. ABOUSHI: That's correct, Your Honor.

4 THE COURT: Okay.

5 MR. ABOUSHI: Anyone that did not use force, we  
6 cannot establish claim of excessive force with.

7 THE COURT: I'm sorry. I missed that last part.

8 Could you say that one more time?

9 MR. ABOUSHI: I said anyone who did not use force  
10 against the Plaintiff, we would not be able to establish a  
11 claim for excessive force.

12 THE COURT: Okay. Understood. Mr. Kalmbach, I'll  
13 give you the last word. Anything else you'd like to add on  
14 your end?

15 MR. KALMBACH: Yes, Your Honor, just a few points  
16 on Plaintiff's argument. First, I think just as a general  
17 manner, what it sounds like is kind of happening right now is  
18 that Plaintiff's starting to assert alternative theories of  
19 liability here, whereas I would caution the Court against  
20 allowing Plaintiff to now argue on the one hand that he never  
21 had a gun, but then, if I did have a gun, then I wasn't  
22 actually holding it at the time. Plaintiff cannot assert  
23 alternative theories of liability, here. I just want to make  
24 that point.

25 As to qualified immunity, I just wanted to

1 reiterate that in order for the Court to deny qualified  
2 immunity, it would have to find a case at the Second Circuit  
3 or higher that found excessive force under a  
4 factually -- specifically, factually similar circumstances.  
5 That's just kind of a small point. As Plaintiff was making  
6 his argument, I looked through our papers, and I just want to  
7 clarify that Officer Feely, my understanding is that he was  
8 asked how much time elapsed between the first and last shot,  
9 not between shots so just wanted to clarify that.

10 As to our Monell claim, I do just want to  
11 reiterate, too, that these points about, like, performance  
12 monitoring, things like that, they're just wrong. Even based  
13 on Plaintiff's -- if you look at the documents that Plaintiff  
14 attaches in support of his complaint -- for example, he  
15 attaches a document, which purports to set the standards for  
16 monitoring, and the Defendants just don't even meet that  
17 here. So I wanted to clarify that.

18 And then, lastly, as to coercion, I'm not aware of  
19 any case law that says that -- or that holds that these  
20 circumstances rise to the level of coercion to invalidate a  
21 plea agreement nor is there -- just the fact that Plaintiff  
22 has appealed doesn't necessarily indicate that he appealed  
23 based on some alleged coercion argument. So that's it for  
24 the points as to our motion.

25 THE COURT: All right. Thank you. Mr. Aboushi, I

1 have another question for you. Mr. Aboushi, what do you want  
2 the Court to consider? Do you want the Court to consider the  
3 plea allocution or to disregard it or credit his testimony  
4 that he did not have a gun or all of the above? In other  
5 words, how do I reconcile the testimony now that he did not  
6 have a gun with the testimony from the allocution? Or do I  
7 not need to reconcile the two? How do address that  
8 inconsistency?

9 MR. ABOUSHI: Well, Your Honor, just -- and to put  
10 a period on something my colleague said, you know, in our  
11 statement of fact and in our brief, it's clear that Plaintiff  
12 did not point -- and I'm quoting Plaintiff, did not point at  
13 anyone or present a gun to anyone. That's clear, right? So  
14 this whole thing that we're asserting alternative theories is  
15 just not true.

16 But to answer your question, Your Honor, I think  
17 the fact that Plaintiff testified that he did not have a gun  
18 and he was coerced, if this is sufficient to overcome the  
19 Defendants' claims and put this before a jury. And the  
20 allocution is -- I think buttresses that statement, but  
21 that's up to Defendants to present to a jury, and the jury  
22 can resolve what Defendants' claims are conflicting  
23 statements because that's what really this comes down to,  
24 Your Honor. The Defendants are saying, look, you said X and  
25 you said Y, and in that situation, a jury needs to reconcile

1 that.

2           So I think there's more than ample evidence to show  
3 the invalid -- that the plea of guilt is invalid as a result  
4 of coercion, again, you have the appeal, you have the record  
5 itself. But I don't think Your Honor needs to go that far in  
6 terms of picking one over the other. I think the fact that  
7 the question of fact remains, and there's more than enough  
8 evidence to substantiate, at this stage, Plaintiff's claim  
9 about coercion. I think Your Honor doesn't need to do  
10 anymore heavy lifting on that.

11           THE COURT: Understood. But at the same time, as  
12 you're aware, the Plaintiff himself cannot manufacture issues  
13 of fact, right? In other words, the Plaintiff himself cannot  
14 create inconsistencies to defeat summary judgment. Is it  
15 your position -- if you're able to answer it, let me know, is  
16 it going to be that he did not have a gun or did he have a  
17 gun, or do you not know?

18           MR. ABOUSHI: Well, for what purposes, Your Honor?  
19 Because in terms of the shooting --

20           THE COURT: Yeah.

21           MR. ABOUSHI: -- our position and the Plaintiff's  
22 position is very clear. When he was shot by the police, he  
23 did not have a gun, and he certainly --

24           THE COURT: Okay.

25           MR. ABOUSHI: -- didn't point a gun at any officer.

1 And I think that's critical, Your Honor, because like I said,  
2 just possessing a gun in and of itself is not a license for  
3 officers to shoot you. They have to, obviously, meet the  
4 standard of threat and -- to themselves, imminent deadly  
5 threat against themselves or another officer. And so you  
6 know, respectfully, I would say that we're going a bit afield  
7 on whether or not he possessed the gun because you still have  
8 to go through a whole other analysis as to whether or not he  
9 presented that gun to the police officers at the scene that  
10 night, he pointed the gun at the officers that night and in  
11 doing so caused a threat such that would justify the deadly  
12 use of force against him.

13 And we would submit, Your Honor, whether or not he  
14 had a gun is not dispositive of the second part of analysis  
15 where he was running from the police and posed no threat to  
16 them. And again, Your Honor, I think that the Plaintiff's  
17 testimony, the Defendants' testimony, the forensics, the  
18 doctors, the Monell expert, the evidence that Your Honor  
19 could look at just by looking at crime scene photos and  
20 location of items all tell you that even if, you know -- even  
21 just putting aside whether or not he plead guilty to a gun,  
22 the use of force that night was woefully unjustified.

23 THE COURT: Okay. Understood. Thank you for that.  
24 What I want to do is go off the record for a minute. Hold on  
25 one second.

1 (Off the record.)

2 THE COURT: Case number 17-cv-6457. We have  
3 counsel for both parties on the line. We went off the record  
4 for a minute. The Court wanted to inquire -- ask for any  
5 recent summary discussions. We are back on the record now.  
6 The Court will take the motion under advisement and rule  
7 quickly. Is there anything else we need to address for  
8 Plaintiff today, Mr. Aboushi?

9 MR. ABOUSHI: No, Your Honor. Thank you for your  
10 time and attention.

11 THE COURT: Okay. Anything else for Defendant, Mr.  
12 Kalmbach?

13 MR. KALMBACH: Yes, one procedural matter, Your  
14 Honor. Plaintiff filed this letter yesterday, eight months  
15 after the motion was fully briefed. I guess I'm just  
16 wondering what Your Honor would prefer. Can we respond to  
17 that? Should we respond to that?

18 THE COURT: It's up to you. If you want to  
19 respond, feel free to respond. If you're going to respond,  
20 how much time do you think you'll need?

21 MR. KALMBACH: Three days, Your Honor, would be --

22 THE COURT: Okay. So if you're so inclined, you  
23 can file a response by July 28th, okay?

24 MR. KALMBACH: Thank you, Your Honor.

25 THE COURT: All right. With that, we are

1 adjourned. Have a nice day, everyone.

2 MR. KALMBACH: You, too.

3 MR. ABOUSHI: Thank you, Your Honor.

4 THE COURT: Bye.

5 (Proceedings adjourned.)

6

7 TRANSCRIBER'S CERTIFICATE

8 I certify that the foregoing is a correct  
9 transcript from the electronic sound recording of the  
10 proceedings in the above-entitled matter.

11

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July 29, 2022

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*Natalie C. Webb*

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Natalie C. Webb

DATE

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Legal Transcriber

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